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82-133

No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SHASHIKANT NARANBHAI PATEL AND HASUBEN SHASHIKANT PATEL,

PETITIONERS,

V.

IMMIGRATION AND NATURALIZATION SERVICE

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

HARRY J. JOE
JOE, ROBERTS & ALLEN, P. C.
2122 Southland Life Tower
Dallas, TX 75201
214/651-0421

Attorney for Petitioners

QUESTIONS PRESENTED

1. Whether the Respondent misapplied 8 C.F.R. § 212.8(b)(4) and erred in determining that the male Petitioner had not proved that he had invested or was actively in the process of investing over $10,000.00 in commercial enterprise when (i) Petitioner had established a fixed committment to invest the requisite amount through an oral contract to borrow the funds and (ii) actually repaid the loan within three months of the loan agreement and previous to a hearing on the issue.

2. Whether the Respondent abused its discretion in denying the Petitioners' applications for adjustment of status to that of lawful permanent residents when the facts of the case did not indicate a finding of pre-conceived intent supported by reasonable, substantial, and probative evidence.

3. Whether the Petitioners have been denied due process and fundamental fairness by the failure of the Immigration Judge to provide a true and complete transcript of the deportation hearing in that the transcript . . . provided was replete with notations of inaudible, unintelligible, and no answer.

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IMMIGRATION AND NATURALIZATION SERVICE
RESPONDENT

Mr. Harry J. Joe, on behalf of Shashikant Naranbhai Patel and Hasuben Shashikant Patel, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The judgment of the Court of Appeals (App. A., infra, p. A-1) is not reported. The opinion of the Board of Immigration appeals (App. B, infra, pp. B-1 thru B-6) is not reported. The opinion of the Immigration Judge (App. C., infra, pp. C-1 thru C-7) is not reported.

This Honorable Court on June 8, 1982, granted an Order Extending Time To File Petition for Writ of Certiorari (Appendix E, infra, p. E-1).

JURISDICTION

The judgment of the Court of Appeals (App. A, infra, p. A-1) was entered on March 19, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. Fifth Amendment to the United States Constitution provides in relevant part:

No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

2. Immigration and Nationality Act of 1952, *as amended*, § 212(a)(14), 8 U.S.C. § 1182(a)(14) specifies:

> (a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> > (14) Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that (A) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of aliens who are members of the teaching profession or who have exceptional ability in the sciences or arts), and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages, and working conditions of the workers in the United States similarly employed. The exclusion of aliens under the paragraph shall apply to preference immigrant aliens described in section 1153(a)(3) and (6) of this title, and to nonpreference immigrant aliens described in section 1153(a)(8) of this title;

3. Immigration and Nationality Act of 1952, *as amended*, § 245(a), 8 U.S.C. 1255(a) specifies:

> The status of an alien who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.

4. 8 C.F.R. § 212.8(b)(4) prior to October 7, 1976 provided in part:

> (b) The following persons are not considered to be within the purview of section 212(a)(14), 8 U.S.C. § 1182(a)(14), of the Act and do not require a labor certification:
>
> > (4) an alien who establishes on form I-526 that he is seeking to enter the United States for the purpose of engaging in a commercial or agricultural enterprise in which he has invested, or is actively in the process of investing, capital totalling at least $10,000, and who establishes that he has had at least 1 year's experience or training qualifying him to engage in such enterprise . . ."

5. 8 C.F.R. § 242.15, effective December 19, 1961 provides:

> The hearing before the special inquiry officer, including the testimony, exhibits, applications and requests, the special inquiry officer's decision, and all written orders, motions, appeals, briefs, and other papers filed in the proceedings shall constitute the record in the case. The hearing shall be recorded verbatim except for statements made off the record with the permission of the special inquiry

officer. In his discretion, the special inquiry officer may exclude from the record any arguments made in connection with motions, applications, requests, or objections, but in such event the person affected may submit a brief.

STATEMENT

The Petitioners are husband and wife and last entered the United States together as nonimmigrant visitors for pleasure on August 22, 1976. The male Petitioner is a native of Kenya and a citizen of Great Britain. His wife is a native and citizen of India. Petitioners had been granted landed immigrant status in Canada and were visiting the United States with the intention of continuing to Canada to reside as immigrants. They brought with them from the United Kingdom two nonnegotiable bank drafts totalling 6,554 pounds that could not be quickly converted into cash.

While in California, the Petitioners were introduced to one R. V. Patel who had been in Dallas, Texas arranging for the purchase of some motels for the principal, Mr. Dahya, in London. Mr. Dahya apparently had only $14,000.00 to invest so R. V. Patel solicited the male Petitioner as a possible investor in the motels. Having aroused the interest of the male Petitioner, said Petitioner travelled to Dallas, examined the property, and determined that it would be a good investment.

The Petitioners retained an attorney in Los Angeles and filed an application for adjustment of status under § 245 of the Immigration and Nationality Act of 1952, *as amended*, 8 U.S.C.A. § 1255 (West Supp. 1981) on October 4, 1976. This application was subsequently denied by the District Director of the Immigration and Naturalization Service at Dallas on November 1, 1978. That application was then renewed before the Immi-

gration Judge in the instant deportation proceeding on November 30, 1978, pursuant to 8 C.F.R. § 242.17 (1981).

After deciding to purchase the motels in Dallas, the Petitioner needed to prepare for financing. As his bank drafts were not readily convertible to cash the Petitioner deposited them in a joint account with his wife and the brother of R. V. Patel, Mr. A. V. Patel. R. V. Patel then advanced Petitioner the funds necesary for the transaction in reliance on an oral promise that the money awaiting collection in the bank was now, in effect, Mr. R. V. Patel's money. Consequently, a partnership agreement between Mr. Dahya and the male Petitioner was drawn up on September 22, 1976 showing joint ownership of the motels and a capital contribution by each partner of $14,622.28. A warranty deed and vendor's lien was issued to the partners on September 15, 1976. A deed of trust and a promissory note for the properties was signed by the Petitioner on September 15, 1976. A signed receipt from the Southwest Land Title Company indicates that $25,429.56 was received from both Mr. Dahya and the male Petitioner on September 15, 1976.

On November 30, 1978, a deportation hearing was held in Dallas, Texas. The Immigration Judge found the Petitioners deportable and denied their applications for adjustment of status on the grounds that the Petitioners had not established that they qualified for such relief because the male Petitioner had not established that he qualified as an investor, and therefore exempt from the labor certification requirement of § 212(a) (14), 8 U.S.C. § 1182(a) (14), under 8 C.F.R.

§ 212.8(b)(4). The applications were also denied as a matter of discretion. Appeal was perfected to the Board of Immigration Appeals where the Immigration Judge's decision was affirmed. The B.I.A. held that the male Petitioner had not established that he was actively in the process of investing over $10,000.00 of his own funds as of October 4, 1976 and that the Petitioners had a pre-conceived intent to remain permanently in the United States when they entered and thus did not merit discretionary action.

An appeal to the United States Court of Appeals, Fifth Circuit, pursuant to § 106 of the Immigration and Nationality Act of 1952 *as amended*, 8 U.S.C. [1105(a) (West 1970), resulted in a per curiam affirmance of the Board of Immigration Appeals' decision.

REASONS FOR GRANTING THE PETITION

1. This case presents a clear example of the Immigration and Naturalization Service's misapplication and failure to follow their own regulations. The misapplication also results in a contradiction to Department of State interpretation. 8 C.F.R. § 212.8(b) (4) effective February 13, 1973, exempts from the labor certification requirement those aliens who are *actively in the process* of investing $10,000.00 in a commercial enterprise. (Emphasis supplied). In *Gill v. I.N.S.*, 666 F.2d 390 (9th Cir. 1982), the Court of Appeals reversed a Board of Immigration Appeals' (hereinafter B.I.A.) finding of ineligibility for investment status concluding that an impermissibly narrow construction of "actively in the process of investing" renders the regulation ineffectual. The Court of Appeals in *Hirunpidok v. I.N.S.*, 641 F.2d 778, 779-780 (9th Cir.

1981) found the critical inquiry to be whether the alien, at the time of his application, is pursuing an ongoing and systematic plan to invest the requisite amount.

In the case at bar the B.I.A. determined the alien to be ineligible for the exemption as an investor where the funds that he borrowed to invest were secured by an oral promise to repay as soon as his British bank drafts could be converted to cash. The B.I.A. said that there was no evidence of a fixed commitment by the Petitioner. In fact, there was a multitude of evidence represented by the presence of Petitioner's name on all of the real estate documents executed at closing. The Petitioner's lender, Mr. R. V. Patel, advanced the money. A firm commitment to repay had been made as evidenced by the fact that the British bank drafts had been used as collateral.

The B.I.A. was not saying that an investor cannot use borrowed funds; rather, the Board inferred that the loan cannot be based on an oral agreement because there is no evidence of such an agreement. This logic presupposes that an oral contract is unenforceable and therefore is not representative of a fixed commitment by the Petitioner. Under the law of the State of Texas, where the agreement took place, an oral contract is enforceable and "may be proved by circumstantial evidence, as well as direct evidence," 14 TEX. JUR. 3d Contracts § 353, p. 594 (1981), *Peters v. Norris*, 402 S.W. 2d 216 (Tex. Civ. App. 1966). The evidence in this case shows that an oral agreement was made and that approximately three months after the loan was made, and prior to an adjudication of the issue, the loan was repaid in full.

State Department Visa Bulletin Vol. V, No. 20 (1982), in reference to 8 C.F.R. § 212.8(b)(4), expressly limits acceptable investments made with borrowed funds to those in which "the alien is personally at risk for the funds in the event of business failure." Moreover, the bulletin expressly allows unsecured loans to be included in the investment. This is precisely the situation in the instant case where the Petitioner, by oral agreement, borrowed funds for which he was personally liable in the event of default.

In determining whether or not a nonimmigrant alien qualifies as a Treaty Investor under § 101(a)(15)(E)(ii) of the Act, the I.N.S. has adopted the policy of adhering to interpretations and tests used by the Department of State Consular Officers who issue such visas in determining whether or not the alien applicant qualifies as a nonimmigrant investor. The I.N.S. will look to the Foreign Affairs Manual as well as Department of State regulations for guidance when it is confronted with the same issue. *Matter of Udagawa*, 14 I. & N. Dec. 578 (1974).

The B.I.A. and the Court of Appeals for the Fifth Circuit have incorrectly adhered to an unduly restrictive interpretation of 8 C.F.R. § 212.8(b)(4) limiting the labor certification exemption to situations, in the case of borrowed funds, in which a written loan agreement has been executed. This interpretation is illogical and inconsistent with the words of the regulation as well as State Department directions to consular offices and officers who issue visas.

This Supreme Court has held that when the wording of a statute is clear and unambiguous, the statute

should be enforced acording to its terms and that there is no room for interpretive construction, *Caminetti v. U.S.*, 242 U.S. 470 (1917). Of course, deference is accorded to the interpretation given a statute by the officers or agency charged with its administration, *Udall v. Tallman*, 380 U.S. 1, 16 (1965). But, agency discretion cannot be exercised so as to conflict with the purpose of the applicable statute. *Cheung v. District Director, I.N.S.*, 641 F.2d 666 (9th Cir. 1980), and the agency's interpretation will not be upheld where it is plainly erroneous or inconsistent with the statute. *Curlott v. Hampton*, 438 F.Supp. 505 (D.Alas. 1977) *Aff'd in part and reversed in part*, 598 F.2d 1175 (9th Cir. 1979). The regulation in question provides the exemption to those "aliens . . . actively in the process of investing" in addition to those who have "invested." An interpretation which ignores this language or construes it as surplusage is clearly erroneous. *United States v. Marubeni America Corp.*, 611 F. 2d 763 (9th Cir. 1980).

2. The B.I.A. abused its discretion in denying the Petitioners' applications for adjustment of status on the basis of a finding that Petitioners had a pre-conceived intent to remain in the United States at the time of entry. When factual determinations are made by a representative of the Attorney General, such finding of fact must be supported by "reasonable, substantial, and probative evidence . . ." Immigration and Nationality Act, § 106(a)(4), *as amended*, 8 U.S.C. § 1105(a)(4) (West 1970). In *Tuan v. I.N.S.*, 521 F.2d 1337 (5th Cir. 1976), the Court of Appeals held that factual determinations of pre-conceived intent must be supported by reasonable, substantial and probative evidence.

The attenuated facts used by the B.I.A. to make their decision were subject to multiple interpretations and in no way could be termed substantial evidence. The Board found that:

> The interrelationships of the parties, combined with the agent's signing of a contract which he knew would require another partner, and the subsequent timing of the male Respondent's [petitioner herein] involvement in the transaction, strongly suggests that at the time the earnest money contract was signed on September 2, 1976, the agent was already aware of the male Respondent's desire to participate in the investment. (Appendix B, infra, p. 4).

The fact is that Petitioners had been in the United States for several weeks before examining the property in Dallas and could have easily entered into the contract themselves without requiring the agent to enter into the contract personally if they had so intended. Likewise, the Petitioners would not have brought non-negotiable bank drafts had they intended to make an immediate investment in the United States. Moreover, the Petitioners had been granted landed immigrant status in Canada at the time of entry to the United States and were going to Canada after a visit to reside there.

The evidence of pre-conceived intent is clearly lacking in reasonableness, substantiality, and probativeness. It is mere conjecture based on an Immigration and Naturalization Service bias towards Indian nationals named Patel. *See* Johnson, "Foreign-Planted Motel Roots Perplex I.N.S.," Dallas Morning News at 1, October 27, 1980, describing such prejudice.

3. The Petitioners have been denied due process and fundamental fairness by the failure of the Immigration Judge to provide a true and complete transcript of the deportation hearing to enable Petitioners to have a fair appeal, especially on the factually complex issue of pre-conceived intent.

An alien in deportation proceedings is entitled to a verbatim transcript of the deportation hearing, 8 C.F.R. § 242.15 (1981). This regulation was designed to protect aliens in deportation hearings, *U.S. V. Calles-Pineda*, 627 F.2d 976, 979 (9th Cir. 1980). The Immigration Judge has the primary responsibility to insure that the transcript of the hearing and record of proceeding submitted to the B.I.A. are orderly, complete, and accurate, *Matter of Charles*, 16 I. & N. Dec. 241 (B.I.A. 1977).

It has been held that "compliance with the regulations is an essential safeguard of an alien's right to due process." *Navia-Duran v. I.N.S.*, 568 F.2d 803 (1st Cir. 1977), and *Attoh v. U.S.*, 606 F.2d 1273 (D.C. Cir. 1979).

In the 128 pages of transcript for the present case there are 119 notations of "inaudible," 50 notations of "unintelligible," and 114 notations of "no answer." An overwhelming and extensive number of these notations deal directly with factual isues which were raised on appeal to the Court of Appeals for the Fifth Circuit, especially with respect to the Respondent's finding of pre-conceived intent.

In the instant matter the Petitioner needed to prove that it was his funds that were ultimately invested in the motels that were purchased by him in September

1976. It was a simple matter of tracing the funds from the sale of Petitioners' property in the United Kingdom to the United States in the form of bank drafts, through the bank in California to Mr. R.V. Patel who had loaned the money to the male Petitioner so that the transaction could be completed. It is respectfully contended that this was made immeasurably more difficult by the blatant inadequacy of the transcript.

The Fifth Amendment to the United States Constitution serves as a guarantee to aliens of procedural due process of law. *Chew v. Colding*, 344 U.S. 590, 73 S.Ct. 472, 97 L.Ed. 576 (1953). It is firmly settled that aliens are entitled in deportation proceedings to procedural due process including the right to a full and fair appeal. *Matthews v. Diaz*, 426 U.S. 67, 96 S.Ct. 1883 (1976). In reference to due process and the realm of administrative discretion in which agencies are free from supervision, Justice Cardozo exclaimed, "the inexorable safeguard * * * of a fair and open hearing [must] be maintained in its integrity, *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 292 (1937). See *The Japanese Immigrant Case*, 189 U.S. 86, 23 S.Ct. 611 (1903).

When there are serious problems with the transcript of [a] deportation hearing the case should be remanded to the Immigration Judge for a *de novo* hearing, *Matter of Kallenberger and Kallenberger*, A20 969 651, A21 582 309, (unpublished decision of the B.I.A., May 6, 1980, App.D, infra, p. D-1 thru D-2). Petitioners submit that their rights to a full and fair appeal were denied by the omissions of the Immigration Judge.

Having been denied a right granted to them by the regulations and the administrative case law, and having been prejudiced thereby, the Petitioners contend that this case should be remanded for a trial de novo to insure the creation of an orderly, complete, and accurate record.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,
JOE, ROBERTS & ALLEN, P.C.

By: HARRY J. JOE

HARRY J. JOE
2122 Southland Life Tower
400 N. Olive Street
Dallas, TX 75201
214/651-0421

Attorney for Petitioners